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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 674

UNITED STATES OF AMERICA, *Petitioner*

v.

THE GARRETT CORPORATION, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Claims

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

JAMES P. BURNS
ROBERT S. SWECKER
815 Connecticut Avenue, N. W.
Washington, D. C.
Counsel for Respondent

Of Counsel:

JOHN N. HAZELWOOD
EUGENE GRESSMAN

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BRIEF FOR THE RESPONDENT IN OPPOSITION

The respondent Garrett Corporation files this brief in opposition to the petition for writ of certiorari submitted by the Solicitor General in No. 674. The judgment of the Court of Claims here in question involves two patents, identified as the Walker and the Taylor patents. That judgment is completely separate from and unrelated to the judgment of that court, validating

an entirely different patent, as to which the Solicitor General seeks review in No. 677, *United States* v. *Palmer*. The requests for review of these unrelated judgments, validating entirely different patents, have been combined in one petition pursuant to Rule 23(5).

QUESTION PRESENTED

Whether the Court of Claims, in holding two particular patents non-obvious and hence valid, properly applied in these two instances the standard of invention specified in 35 U.S.C. § 103, as explicated by this Court in *Graham* v. *John Deere Co.*, 383 U.S. 1.

REASONS WHY THE PETITION SHOULD BE DENIED

None of the considerations set forth in the Solicitor General's petition justifies the grant of certiorari in No. 674. More particularly:

1. The Government's "basic position" as to the validity of these two patents does not qualify for review under certiorari standards

The Solicitor General has stated (Pet. 8) that the Government's "basic position" is that the two patents upheld in this proceeding "involve only advances that are obvious in light of the prior art," and that they are but commonplace innovations "which do not satisfy the constitutional standard of patentability." But at the same time it is conceded (Pet. 10) "that this Court cannot consider on the merits every case in which it appears that the standard of patentability has been misapplied."

That concession is well taken. The Government, in the posture here of a disappointed litigant, asks only that this Court give it another chance to urge that two

particular patents do not meet the standards of nonobviousness. No claim is made that the court below ignored or declined to apply those standards. Nor is there any assertion that the Court of Claims proclaimed some new or unwarranted standard of patentability. There is not even a suggestion of a conflict of appellate opinion concerning the patentability of the two devices here in issue. The Government's petition, in short, is nothing more than an attempt to have this Court redetermine certain factual and legal matters that allegedly were resolved erroneously in the court below. But as was said in *Magnum Co.* v. *Coty*, 262 U.S. 159, 163, "The jurisdiction [of the Supreme Court to review cases by certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

This Court has announced time and again that "Such an ordinary patent case, with the usual issues of invention, breadth of claims, and noninfringement, this court will not bring here by certiorari unless it be necessary to reconcile decisions of circuit courts of appeal on the same patent." *Keller* v. *Adams-Campbell Co.*, 264 U.S. 314, 319; and see *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178-179. And where the issues of patentability, such as those in this case, turn upon what this Court in *Graham* v. *John Deere Co.*, 383 U.S. 1, 17, described as "basic factual inquiries," this Court's function is not to duplicate the lower court's inquiry into the facts, absent some other compelling reason for the grant of certiorari. In this situation, "This Court accepts the findings of fact made by the Court of Claims [in a patent infringement action] and cannot review them." *Stilz* v. *United States*, 269 U.S. 144, 147; see also *Universal Oil Co.* v.

Globe Oil Co., 322 U.S. 471, 473. In other words, certiorari does not issue merely to review the factual determinations of the Court of Claims in this proceeding respecting the prior art, the claims in issue, and the level of ordinary skill in the pertinent art which are the critical elements respecting nonobviousness and patentability.

The Government's criticism of the findings as to nonobviousness does not, of course, alter the essentially factual nature of the decision below. As a constant litigant in the Court of Claims in opposition to patentability claims, the Government rather naturally is critical of any decision finding a device nonobvious and patentable. And the necessarily subjective nature of most determinations of what is obvious or nonobvious makes such determinations vulnerable to criticism and disagreement. But all that the Government has done here is to seek to escalate its disagreement with the result below into an unsupported accusation that this decision may represent a sinister "trend toward erosion" (Pet. 11) of the nonobviousness standard in those situations where the Court of Claims finds a device nonobvious and patentable. That accusation is not only ill-founded, see pp. 5-11, *infra*, but cannot disguise the fact that only a unique factual matter is here presented for review.

Finally, the assertion of the Government (Pet. 8) that the constitutional and statutory standard of patentability has been violated by the decision below is but a variant of the time-honored complaint of any losing party that the court below did not see fit to accept his arguments and contentions and hence the decision violates the principles for which he fought. This Court should not be burdened with so parochial a complaint,

especially since it offers no opportunity for this Court to explore, delineate or develop the law of patents in ways that are of universal concern.

2. The assertion that the decision below illustrates a general tendency by the Court of Claims to apply a lax standard of nonobviousness is without factual or statistical basis

In an effort to escape the rule that this Court will ordinarily not review the merits of a particular patent, the Solicitor General has made a generalized accusation (Pet. 8, 10-12) that the decisions of the Court of Claims involved in No. 674 and No. 677 "illustrate a general tendency on the part of the Court of Claims to apply a much laxer standard than that prescribed in *Graham*" and "represent a trend toward erosion of that standard by one lower federal court whose approach conflicts with that of other federal courts." Such an accusation is totally unfounded.

To begin with, the petition nowhere articulates the nature of this alleged laxness on the part of the Court of Claims. There is not even an assertion as to what point or in what respect that court has demonstrated "a general tendency" to depart from the *Graham* standards of nonobviousness. Apart from the decisions involved in No. 674 and No. 677, which are not unexpectedly denounced by Government counsel as "egregious" (Pet. 10, 12) and "examples of disparities" (Pet. 12), there is no claim that the court below has rendered even one wrong decision on the issue of obviousness, let alone a significant number of "egregious" decisions, of which the instant ones are mere examples.[1] Seemingly, the so-

[1] The petition states (Pet. 12): "We do not undertake to demonstrate that any of the decisions of the Court of Claims upholding patent validity is wrong . . ."

called "general tendency" began and perhaps ended with the rendition of the two decisions here involved. The conclusion is inescapable that the "general tendency" toward "egregiousness" and "laxness" are but semantic efforts to clothe an impermissible effort to have this Court review the unique facts involved in particular patents.

The petition does contain an abortive attempt (Pet. 11-12) to document an "approach" of the Court of Claims that "conflicts with that of other federal courts." Reference is there made to two instances where other federal courts invalidated certain patents that previously had been held valid by the Court of Claims. But this reference is drained of all significance by the Government's statement (Pet. 12) that "We do not undertake to demonstrate that any of the decisions of the Court of Claims upholding patent validity is wrong or that the two conflicting decisions of other federal courts were right." Where, then, is there a wrong "approach," an "erosion," by the Court of Claims that needs review and correction by this Court?[2] For aught that appears in the petition it may have been the two other federal courts, not the Court of Claims, that were guilty of "laxness" or "erosion."

Even the alleged conflicts between the Court of Claims and these other federal courts are highly suspect or non-existent. This Court was not sufficiently impressed by the asserted conflict between the Court of

[2] Conflicts as to the validity of Patents A and B can hardly be said to justify review of a decision upholding the validity of Patent C, as to which there is no conflict of decision. If the conflicts as to Patents A and B involve a wrong "approach" or an "erosion" by one of the lower courts in conflict, that feature can be reviewed by this Court on certiorari directed to one of the conflicting courts.

Claims and the Fourth Circuit in the *Blumcraft of Pittsburgh* patent litigation[3] to grant review of the Fourth Circuit decision, the petition for certiorari having been premised upon this so-called conflict. *Blumcraft of Pittsburgh* v. *Citizens & Southern National Bank*, No. 1355, Oct. Term 1968, 395 U.S. 961. And in the *Stukenborg* patent litigation,[4] the differing result was reached by the federal district court only because it had before it a significantly different record of the prior art than was before the Court of Claims.

But there is an even more fundamental irrelevance to the Government's reliance on these dubious conflicts. It is an irrelevance that equally marks the Government's use of certain raw statistics (Pet. 12, Pet. App.

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[3] This litigation is referred to at Pet. 11. *Blumcraft of Pittsburgh* v. *United States*, 372 F. 2d 1014 (Ct. Cls.); *Blumcraft of Pittsburgh* v. *Citizens & Southern National Bank*, 407 F. 2d 557, 559. The Court of Claims had before it only design patent No. D-171-963, whereas the Fourth Circuit also passed upon the related utility patent No. 2,905,445; the record before the Fourth Circuit was completely new and different from that before the Court of Claims.

[4] The *Stukenborg* litigation is referred to at Pet. 11-12. *Stukenborg* v. *United States*, 372 F. 2d 498 (Ct. Cls.); *Stukenborg* v. *Teledyne, Inc.*, 299 F. Supp. 1152 (C.D. Calif.). In the latter case, the District Court indicated (299 F. Supp. at 1164-1165) why it did not consider the earlier ruling of the Court of Claims decisive:

> "Of greater importance, however, is the apparent fact that the Court of Claims was either unaware of the 407 patent or did not consider it. For the foregoing reasons and especially because the Court of Claims did not take into account the 407 patent, the most important piece of prior art for testing the validity of the 408 patent, this Court will not consider the Court of Claims decision as binding on the question of whether plaintiffs have a valid patent on the whole turnbuckle assembly."

C) to proclaim that the higher percentage of patent validations by the Court of Claims (60%), in contrast with the lower percentages of validations by the courts of appeals (27.9%), "tends to suggest that different standards are being employed" by the Court of Claims. That irrelevance, and indeed that error, springs from the simplistic and dangerous notion that every decision of the Court of Claims upholding the validity of a patent can properly be classified; without benefit of analysis, as indicative of an erosion of the *Graham* standard by that tribunal. Such a notion is grossly unfair to the integrity of the Court of Claims and cannot qualify as a relevant consideration in determining whether the judgment below should be reviewed.[5]

Moreover, this statistical claim that the Court of Claims has shown a higher percentage of patent validations than that of the courts of appeals is replete not only with this simplistic notion but with baseless assumptions and gross factual errors. The use of the

[5] This effort to utilize raw statistical comparisons of the judicial treatment of particular and unrelated patent claims is reminiscent of the Government's use of the same technique in 1949 in an attempt to secure review of an appellate refusal to enforce a Labor Board order in a particular situation. See Pet. 10-23, *National Labor Relations Board* v. *Atlanta Metallic Casket Co.*, No. 431, Oct. Term 1949.

The Government there claimed, as the prime reason why certiorari should be granted, that over a two-year period the court of appeals below had enforced in full only three of 15 contested Board orders. In contrast, statistical charts showed that contested Board orders had been enforced in full in 38 of the 59 cases resolved by the ten other courts of appeals during that period. The Government asserted that the refusal to enforce the order in question was "symptomatic of a pattern of denial" and that the court below had denied enforcement in "an inordinately large number of cases" recently before it.

This Court denied the Government's petition without comment. 338 U.S. 910.

comparison assumes that there is some implicit constitutional or statutory or judicial requirement that only a certain percentage of patents should be judicially validated and that all the eleven Circuits and the Court of Claims should aim toward approximating that percentage. It is further assumed that any appreciable excess above the Government's notion of an acceptable percentage norm must indicate, without any undertaking "to demonstrate that any of the decisions of the Court of Claims upholding patent validity is wrong" (Pet. 12), "that different standards [of patentability] are being employed" (Pet. 12) by the offending tribunal. Such questionable assumptions do not serve as an adequate basis for the grant of certiorari.[6]

The dangers implicit in the unsophisticated use of raw percentage figures are dramatically illustrated by the errors that appear from even a superficial analysis of the cases used in this "numbers game". One case alone in the post-*Graham* period of the Court of Claims, *Autogiro* v. *United States*, 181 Ct. Cls. 55, is listed by the Government (Pet. App. C, p. 77) as having upheld the validity of 11 patents, and that decision accounts for virtually all the increase in validations from the pre-*Graham* period (14 validations) to the post-*Graham* period (27 validations). Yet a reading of the Court of Claims opinion in the *Autogiro* case, 181 Ct. Cls. at 91-92, reveals that the validation of the 11 pat-

[6] A higher percentage of validations by the Court of Claims could be due in part to the nature and importance of the patents it is called upon to adjudicate. All such patents have allegedly been infringed by the Government, which is some indication that the patents involved devices of sufficient novelty and importance to warrant their use or copying by the Government. Thus a higher percentage may be validated, compared to those involved in strictly private litigation in the courts of appeals.

ents stemmed not from any repudiation or erosion of the *Graham* standard but from the fact that "Neither party has properly excepted to any findings of fact on validity" made by the trial commissioner. And in *Barrett* v. *United States*, 186 Ct. Cls. 210, another case appearing in the post-*Graham* statistics, the question of validity was never reached since the court found that the United States had not infringed the patent.

Moreover, not all the validations and invalidations of the Court of Claims, as listed in Appendix C of the petition, involved the *Graham* or § 103 nonobvious test of patentability. Thus at least seven of the 29 pre-*Graham* decisions and at least two of the post-*Graham* decisions were premised on something other than the non-obvious standards.[7] Since the percentage figures of validations and invalidations by the courts of appeals are not broken down as to cases, it is impossible to tell how many of these cases really involved the standard of nonobviousness, which is the only pertinent test in question. But the most minimal adjustment made necessary by these obvious errors in the Government's listings of Court of Claims decisions results in a 13-12 edge for invalidations in the pre-*Graham* period and a similar 17-16 bulge for invalidations in the post-*Graham* period.

Enough has been said to indicate the dangers and uncertainties of using unevaluated statistics to level a serious charge of "erosion" and "laxness" at the Court

[7] The seven pre-*Graham* decisions not involving § 103 are numbered in Appendix C as 1, 3, 13, 19, 22, 25, and 29. The two post-*Graham* decisions not involving the *Graham* standard are numbered 36 and 44, the *Autogiro* and *Barrett* cases discussed above in the text. Two other post-*Graham* cases, Nos. 30 and 31, involved commissioner's opinions rendered prior to *Graham* and simply adopted by the Court of Claims.

of Claims. These bare figures, containing significant errors, serve neither to prove nor to indicate any improprieties by the Court of Claims nor to support any reason for the grant of certiorari. Suffice it to say that unreliable and unevaluated statistics do not a lax standard make.

3. The assertion that the "lax standard" of the Court of Claims will have a serious fiscal impact and may impair competition in the procurement of government contracts is without foundation

In an attempt to impute great public importance to this case, the Solicitor General's petition asserts (Pet. 13-14) that the so-called lax standard of the Court of Claims will have a serious impact upon the Government's potential liability in 71 patent infringement suits pending in the Court of Claims and upon the competitive nature of the government's procurement system.

But viewed against the backdrop of the undocumented and baseless charge of laxness, the allegation of resulting fiscal disaster loses its chilling effect. That allegation not only lacks any factual predicate but assumes that the Court of Claims will in the future ignore all the limits of the *Graham* nonobvious standard, validate all patents brought before it, and award the patent owners the full $250 million to $500 million that they are allegedly seeking.[8] The history and reputa-

[8] The Government's wholly unexplained estimate of potential liability in the 71 patent infringement cases pending in the Court of Claims is highly questionable. The patent infringement awards of the Court of Claims in some 104 cases decided since 1932 aggregate $22,904,846.47, an amount that is less than one-tenth of the Government's lowest estimate of potential liability stemming from the 71 currently pending cases. See tables of money judgments in Davis, U.S. Court of Claims Patent Practice, pp. 226-230 (1970).

tion of the Court of Claims, known for its expertise and care in dealing with patent infringement claims, are more than adequate answers to such a reckless allegation.

4. The Court of Claims has properly recognized and applied the Graham standard of patentability in this case

The critical feature of this case, and one that is not disputed by the Solicitor General, is that the Court of Claims has given full recognition to the standard of nonobviousness as prescribed in the *Graham* decision. That court has made no attempt to change, dilute, expand or ignore that standard. Thus in the trial commissioner's opinion, as adopted by the Court of Claims in this case, the guidelines set out in *Graham* were repeated and faithfully followed in assessing the validity of the two patents in issue:

> "Defendant says claims 2 and 3 are invalid under 35 U.S.C. § 103, which requires that the invention be unobvious to one of ordinary skill in the art at the time it is made. Resolution of this issue requires factual analysis of (1) the scope and content of the prior art, (2) the differences between the prior art and the claims in issue, and (3) the level of ordinary skill in the pertinent art. *Graham* v. *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966); *Martin-Marietta Corp.* v. *United States*, 179 Ct. Cl. 70, 373 F. 2d 972, 153 USPQ 206 (1967)." Pet. App. A, p. 21; and see Pet. App. A, p. 28.

A similar utilization of these guidelines can be found in each of the decisions of the Court of Claims rendered after the *Graham* opinion, as listed in Pet. App. C, pp. 77-78. Indeed, in one of those cases in which a patent had been held invalid, the Solicitor General opposed certiorari by emphasizing how faithful the Court of

Claims had been to the *Graham* standard of nonobviousness. In his memorandum in opposition in No. 299, Oct. Term 1968, *Erwin-Newman Co.* v. *United States*, 393 U.S. 844, the Solicitor General stated (pp. 2-3):

> "Contrary to petitioner's assertion . . . the Court of Claims followed the standards for determining obviousness under 35 U.S.C. 103 as enunciated by this Court in *Graham* v. *John Deere Company*, 383 U.S. 1, and *United States* v. *Adams*, 383 U.S. 39. The court expressly noted that the application of 35 U.S.C. 103 requires the determination of (1) 'The scope and content of the prior art'; (2) 'Differences between the prior art and the claims at issue'; and (3) 'The level of ordinary skill in the pertinent art' . . . . The court's determination of these elements in the instant case was correct, and presents no question warranting further review."[9]

And twice this very Term the Solicitor General has reiterated to this Court that in situations where patents had been held invalid the Court of Claims has carefully observed the *Graham* guidelines of nonobviousness. See p. 3 of his brief in opposition in *Decca Limited* v. *United States*, No. 407, Oct. Term 1970, certiorari denied Oct. 19, 1970, where he advised that "the Court of Claims properly applied the nonobviousness requirements of 35 U.S.C. 103"; and see p. 4 of his brief in opposition in *Nossen* v. *United States*, No. 243, Oct. Term 1970, certiorari denied Oct. 12, 1970, where he stated that the Court of

[9] See also the Solicitor General's memorandum in opposition in No. 228, Oct. Term 1969, *Tri-Wall Containers, Inc.* v. *United States*, certiorari denied, 396 U.S. 828. He there opposed review of a Court of Claims determination of patent invalidity, arguing that the court's ruling was purely factual and amply supported; thus the application of § 103 raised no issue of general importance in the administration of the patent laws.

Claims had properly concluded that "under the standards set forth by the Supreme Court in *Graham* v. *John Deere Co.*, 383 U.S. 1, 17, 148 U.S.P.Q. 459, 467 (1966), this claimed subject matter is obvious in view of the above-mentioned prior art disclosures."

The Government thus creates the distinct impression that it accuses the Court of Claims of infidelity in the application of the *Graham* guidelines only where that court upholds the validity of a patent. Where that tribunal, utilizing the same guidelines, concludes that a particular patent is invalid, the Government quickly finds complete adherence to the nonobviousness standard. Such a double standard in the Court of Claims' treatment of obviousness matters simply does not exist. If any proof of that fact is needed, it is to be found in this Court's ruling in *United States* v. *Adams*, 383 U.S. 39, decided simultaneously with the *Graham* case. This Court there approved the findings of the Court of Claims respecting the nonobviousness of certain patent claims; in effect, this Court recognized that the Court of Claims properly understood the nonobviousness test and properly applied it in that instance in validating a patent over the Government's objections.

Thus the Government cannot legitimately complain about the standard used by the Court of Claims, or about any "laxness" in the use of the standard to validate patents, or about any "approach" by the court differing from that of other federal courts. The petition, stripped of its irrelevancies, inaccuracies and double standards, is simply an expression of disagreement with the court's application of the established guidelines to the particular patents in issue.

That there is such disagreement in assessing the application of the nonobviousness test is not surprising.

To repeat what this Court said in *Graham*, 383 U.S. at 18, what is obvious "is not a question upon which there is likely to be uniformity of thought in every given factual context." But what is surprising is that the Government has seen fit (Pet. 8-9) to express that disagreement by reliance upon certain colorful language in the dissenting opinion below—referring to one who did not see the obviousness of the Walker patent as prone to "put the spout on the bottom of a teakettle" and stating that the Taylor patent claim was familiar "to anyone who ever attended a Barnum & Bailey circus." These are mere subjective reactions of one person.

The hard facts are that the trial commissioner and the Court of Claims, utilizing the *Graham* guidelines, premised their determinations of nonobviousness upon a thorough analysis of 700 pages of testimony and 105 exhibits submitted by the parties, plus outside tests conducted in the presence of the fact finder. Some claims were found invalid for obviousness or for other reasons, while the claims in issue were found nonobvious and hence patentable. See Pet. App. A, pp. 17-30. The findings of nonobviousness as to both the Walker and Taylor patents were grounded upon an extensive study of the prior art, a comparison of that prior art and the claims in issue, and an examination of the level of ordinary skill in the art. These are matters fully set forth in the opinion of the trial commissioner and need not be repeated here. See Pet. App. A, pp. 22-23, 27-30.

The Government's argument that the Walker and Taylor devices are obvious is fraught with what the trial commissioner called the "dangers of hindsight reasoning" (Pet. App. A, p. 28) and overlooks the

fact that simple changes can be "unobvious when viewed in light of the history of the art" (Pet. App. A, p. 29). See *Eibel Process Co.* v. *Minnesota & Ontario Paper Co.*, 261 U.S. 45. But the important and ultimate point in this case is that the trial commissioner and the Court of Claims made allowable and educated determinations within the established guidelines. They were determinations as to what is obvious, a highly subjective matter that lends itself easily to differing judgments. But because the determinations here were judgments properly made in execution of the standards established by this Court, there remains no basis for review of those determinations.

CONCLUSION

For these reasons, the petition for a writ of certiorari in No. 674 should be denied.

Respectfully submitted,

JAMES P. BURNS
ROBERT S. SWECKER
815 Connecticut Avenue, N. W.
Washington, D. C.
Counsel for Respondent

Of Counsel:

JOHN N. HAZELWOOD
EUGENE GRESSMAN

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